

AIDS and Employment Discrimination

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INTRODUCTION

Acquired immune deficiency syndrome (AIDS) confronts society and the law with a host of problems. Employment discrimination has already arisen as one of the more contentious of these problems. AIDS has several unique aspects that make employment discrimination issues controversial and complicated. First, there is neither a vaccine nor cure for the disease. Second, it appears to be 100% fatal. Third, it is contagious. These three factors have caused considerable fear in the populace directed towards the victim or carrier of the disease even though it is believed to be almost impossible to contract the disease through casual contact with a carrier. Fourth, in the United States it has been a disease primarily limited to male homosexuals and intravenous drug abusers. Homosexuals, although generally not favored in our society, have proven to be a very vocal and assertive force in demanding protection from all forms of discrimination. Fifth, a person may be contagious but asymptomatic for years. It is not yet known how many of these asymptomatic carriers will go on to develop AIDS; estimates range from 4% to 100%. Sixth, there are medical conditions between AIDS and asymptomatic carriers of the AIDS virus where the victim suffers from various physical maladies. This is generally known as AIDS related complex (ARC).

Victims of AIDS and AIDS related conditions are discriminated against for many reasons. Fear of contagion, which bears on customer preference, co-employee concerns, and the employer's own fear and prejudice, is one reason. Discrimination may also be

based on concern over increased medical and life insurance premiums, increased medical care expenses, absenteeism, short career potential, aggravated workers' compensation claims, or prejudice against homosexuals, the group most identified with the disease.

Federal and State laws enacted to protect the handicapped from discrimination are being used by those with the AIDS and AIDS related conditions to combat employment discrimination in both the hiring and firing of workers. The applicability of many of these statutes to AIDS is still in dispute. This paper will examine the application of Federal Rehabilitation Act to AIDS victims.

Handicap protection statutes are of recent origin. Case law interpreting the statutes has only started to burgeon during the last five years. The statutes have been construed to cover a wide variety of conditions not traditionally recognized as handicaps. Consideration of diseases as handicaps has met with mixed results under these statutes. For example, in New York and Wisconsin cancer is a protected handicap, while in Illinois it is not.

Technology is now developing that will allow us to tell, even in the womb, if an individual is at risk of developing such things as heart disease, cancer, or muscle diseases, sometime during his life. The rules laid down in the AIDS cases will probably have application in determining whether such tests can be used to screen for the healthiest candidates for employment, thereby ensuring minimal medical costs.

AIDS: THE DISEASE AND ITS CONSEQUENCES

AIDS: In General

The first cases in the United States of what would lead to the identification of AIDS were reported in 1981 when several otherwise healthy male homosexuals were diagnosed with either a rare opportunistic infection (OI),¹ or cancer² typically occurring only in individuals with severely compromised immune systems. Initially referred to as "gay-related immune deficiency" (GRID), the designation was changed to Acquired Immunodeficiency Syndrome (AIDS) in 1982 when it became apparent that the syndrome was not limited to male homosexuals.³ The term AIDS is used exclusively for cases that fit the U.S. Center for Disease Control (CDC) surveillance definition. This definition has been evolving since 1982 as more is learned about the disease.⁴

Basically, AIDS is a disorder of the human immune system leading to enhanced susceptibility to particular opportunistic infections and certain cancers.⁵ In the immune-depressed victim these infections or cancers will eventually bring about the person's death.⁶ It is important to note that AIDS compromises only a portion of the victim's immune system.⁷ As a consequence, the AIDS victim is susceptible to the particular infections and cancers that would normally be controlled by the compromised portion of the immune system.⁸ The AIDS victim is not at any special risk from many common germs such as those causing the common cold. The opportunistic infections that do pose a risk are often present in the victim's body before his immune system is compromised.⁹ This becomes important when considering whether the

AIDS victim is at any special risk by being exposed to germs common to most work environments.

The AIDS victim may die from the first opportunistic infection that he develops or he may recover from the infection. Each bout with an infection, however, further weakens the individual until at some point an infection, or cancer, proves fatal.¹⁰ The immediate effects of the OI or cancer may range from mere discomfort to complete disablement, requiring hospitalization.¹¹ This is important when considering whether the individual is physically capable of performing a particular job once AIDS has developed.

Once AIDS develops, the average victim's life expectancy is 12 to 18 months.¹² As of December 1986, CDC reported that 79% of those diagnosed before January 1985 had died.¹³ Chances of surviving more than 5 years after diagnosis of AIDS are slim.¹⁴ There are no known cases of anyone recovering from AIDS.¹⁵ This poor prognosis is important to the employer who invests time and money in training an employee he expects to employ for more than a year.

HIV Infection: The Heart of the Matter

Despite its notoriety, AIDS is only a narrow point on a wide spectrum of illnesses resulting from a human-immunodeficiency-virus (HIV) infection.¹⁶ HIV is an infectious and communicable retrovirus¹⁷ that infects a particular subset of white blood cells (T4 lymphocytes) resulting in the dysfunction of the infected cells and the multiplication of the virus.¹⁸ The subset of cells involved are essential for stimulating the immune system to

generate antibodies against various bacteria, fungi, protozoa, viruses, and neoplasms.¹⁹

There is also evidence that HIV can infect brain cells resulting in neurological diseases such as dementia.²⁰ To what extent the virus causes direct damage to the brain versus indirect damage through compromising the immune system in the brain is not completely understood. In September 1987, the CDC will expand the definition of AIDS to include individuals infected with HIV who have dementia.²¹

HIV infection is a necessary condition for the development of AIDS.²² Individuals who are not infected with HIV cannot develop AIDS. A person infected with HIV may remain healthy and completely asymptomatic.²³ Such individuals are generally referred to as "seropositive". Estimates of the percentage of seropositives who will develop AIDS range from 4% to 100%.²⁴ This wide range reflects the limited knowledge currently held on the pathogenesis of the disease.

Although it is known that HIV infection is a necessary condition for developing AIDS, it is not known if it is a sufficient condition. Some experts hypothesize that co-factors must be present before the seropositive individual will develop AIDS.²⁵ It is also unknown to what extent the infected individual's immune system can combat or suppress the virus. To date, however, there are no known cases of a person infected with HIV becoming free of the virus. There is no cure for the infection and no known way to prevent seroconversion.²⁶

Once a person becomes infected, he may develop symptoms in a matter of months, years, or never.²⁷ Based on current statistics, however, it appears that 4 to 20% of those infected will develop AIDS within 5 years.²⁸

The HIV infectee may develop illnesses resulting from immune deficiency that do not fall under the CDC surveillance definition. These illnesses include lymphadenopathy syndrome (LAS),²⁹ prolonged unexplained fever, myalgia,³⁰ fatigue, gastrointestinal symptoms, and sore throat.³¹ These manifestations are generally referred to as AIDS-related complex (ARC).³² LAS/ARC fall in more of the spectrum of illnesses resulting from HIV infection. CDC does not monitor reports of LAS/ARC. As a result statistics on LAS/ARC are not as readily available as with AIDS.³³ One study, however, estimates that 25% of HIV infected individuals will develop ARC.³⁴

LAS and ARC are not necessarily stages in the development of AIDS. A person may go from seropositive to AIDS directly, and a person who develops LAS or ARC might never develop AIDS. One study reports that 29% of HIV patients with LAS progressed to AIDS within 4½ years.³⁵

Less is known about HIV infection of brain cells than white blood cells. It appears possible that neurologic infection can take place even though there is no evidence of immunodeficiency.³⁶ It is also estimated that 60% of AIDS patients will develop dementia.³⁷ Neurologic infection may first manifest itself as depression, forgetfulness, poor concentration, psychomotor retardation, decreased alertness, apathy, withdrawal, and loss of

libido.³⁸ These problems are of particular importance in employment situations where concentration and coordination are necessary for safety or productivity. At the extreme, the victim may experience profound dementia, seizures, coma, and death.³⁹ The neurological illnesses complete the spectrum of illnesses resulting from HIV infection.

Risk Groups

In the United States, AIDS is still a disease predominately occurring in homosexual/bisexual men and intravenous (IV) drug abusers. The cases break down as follows:⁴⁰

<u>RISK GROUP</u>	<u>% CASES</u>
Homosexual/Bisexual Males	66
IV Drug Abusers	17
Homosexual/Bisexual IV Drug Abusers	8
Heterosexual Partners of Infected Persons	4
Recipients of Blood Transfusions	2
Persons with Hemophilia or Coagulation Disorders	1
No Risk Group/Others	2

There can be little doubt that these statistics will influence the general public's perception of the disease.⁴¹ Homosexuals and drug abusers are not generally favored in our society. Extending employment discrimination protection to diseased homosexuals may not be popular in many areas of the country.⁴² As a result it can be expected that different forums in different areas of the country will construe employment laws that might apply to HIV/LAS/ARC/AIDS in various fashions.

Transmission

Who is contagious. It is generally held that a person may be contagious from the time of infection to after death.⁴³ Our knowledge in this area is not complete. There is definite evidence, however, that a seropositive individual can transmit the virus.⁴⁴ There is no reason to assume that an infected individual is not contagious at any given time.

How HIV is transmitted. HIV has been isolated from the blood, semen, saliva, tears, breast milk, cerebrospinal fluid, neural tissues, female cervical and genital secretions, and urine of infected individuals.⁴⁵ Given the fact that the virus infects and reproduces in white blood cells (T4 lymphocytes) it is theoretically possible to find the virus in any body fluid or tissue that contains such cells.⁴⁶ The corollary to this is that in order to infect an individual the virus must reach the victim's white blood cells alive.

It is easy to document how HIV can be spread, but more difficult to prove how it is not spread. Epidemiologic evidence in the United States has implicated only blood and semen in transmission, by way of anal or vaginal intercourse, use of contaminated IV needles, or receipt of tainted blood product transfusions.⁴⁷ The evidence to date indicates that HIV is not transmitted through casual contact, insect bites, or foodborne, waterborne, or airborne means.⁴⁸ Most notably there have been no documented cases of the virus being transmitted through saliva by biting or kissing.⁴⁹

The Center for Disease Control has stated that "[t]he kind of nonsexual, person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission."⁵⁰ This position is based primarily on the available data of existing cases and only partially on our understanding of the biologic limitations of the virus.⁵¹ Given that we only have data concerning cases over the past 7 years and the fact that the data is largely limited to HIV infections that have progressed to ARC or AIDS, there is no guarantee that our statistical data accurately predicts all modes of transmission. Consequently, transmission through some forms of casual contact cannot be categorically ruled out, but statistically the risk of transmission through casual contact appears minimal.

The CDC has noted that there are some risks of transmission by infected health care workers who are involved in invasive procedures or have contact with the mucous membranes of the patient.⁵² Simple precautions can and should be taken by all health care workers to eliminate these risks. Similar risks and precautions apply to personal-service workers whose service involves breaking the skin, such as in tattooing, acupuncture, and ear-piercing.⁵³ The CDC sees no special risk for other personal-service workers, or food-service workers transmitting HIV, but goes on to discuss them because of public concern.⁵⁴ The Center emphasizes the importance of good hygiene and sanitation practices of such workers. Food-service workers who cut themselves while working should discard any contaminated food. Both food and

personal-service workers with running lesions or weeping dermatitis should refrain from contact with clients or food.⁵⁵

CDC's caution in making these "gratuitous" recommendations illustrates the limits of our knowledge and understanding of the transmission of the virus. Do we have enough statistics from the last five years to feel confident that the risk of transmission is de minimis? Is statistical evidence concerning the lack of risk enough or should our risk assessment be premised on the actual biologic limitations and strengths of the virus -- information we do not currently have? Public health officials seem to think that our current statistical and scientific information is sufficient to conclude there is little risk.⁵⁶ Some courts and administrative agencies agree.⁵⁷ Many more will be called upon to decide this issue.

Fear. No matter what the experts say, many people will fear contact with HIV-infected persons.⁵⁸ This is not surprising given the mystery of the disease and its potentially fatal and incurable consequences. Many people believe cancer is contagious and shun those who have it or have recovered from it even though our knowledge of cancer is more extensive and the evidence against contagion more conclusive than for AIDS.⁵⁹

Several studies have shown that people do not generally assess risks in a rational manner.⁶⁰ People respond to the hazards they perceive as they perceive them seldom utilizing statistical data.⁶¹ Instead they use judgmental rules, known as heuristics, to analyze the risk.⁶² In most cases heuristics work fine, but in others they distort the risk by either exaggerating

it or minimizing it.⁶³ Consequently, education will not necessarily control the fear of AIDS. Where education leaves off, the law can step in and penalize people for holding and acting upon certain fears. In the area of civil rights, for example, the law penalizes those who discriminate against others because of race, color, religion, national origin, sex, age, or handicap in many situations. The civil rights cases are slightly different because they generally involve hate, bias, and prejudice unrelated to fear. The legislatures and courts are, of course, free to ignore any distinction between unreasonable hate and unreasonable fear, but someone acting out of fear might warrant more consideration than one acting out of hate, especially considering the difficulty in assessing the reasonableness of a particular fear.

Testing

Prior to 1985 there was no screening test available to determine if a person was infected with HIV. Asymptomatic carriers of the virus could not be identified and consequently discrimination of this class of individuals was not a concern. In 1985, an enzyme-link immunosorbent assay (ELISA) to detect HIV antibodies was licensed by the Food and Drug Administration.⁶⁴ The test was originally used as a means of protecting the country's blood supply.⁶⁵ A positive test result also came to be part of the CDC surveillance definition of AIDS.⁶⁶ In addition, it gave employers, insurance companies, and the government a means of discovering who had the virus, thus establishing a new group for discrimination. The size of this group has been kept relatively small because of actual and potential legal limits to testing and

the short time that the test has been available. With mandatory testing being seriously advocated at both the state and federal level, this class could exceed a million persons depending on how much of the population is tested.⁶⁷

The ELISA works on the assumption that persons exposed to HIV will develop specific antibodies to the virus. If a person carries the antibodies it is proof that they have been exposed to the virus because the antibodies do not develop without prior exposure to the virus. The test does not establish the continued presence of the virus, but there are no documented cases of a person with the antibodies not having the virus.⁶⁸ A more expensive (\$100 versus \$2-3) and complicated test, called the Western Blot test, can be used as a confirmation test.⁶⁹ This test identifies the antibodies through a method measuring the specific molecular weight of the antibodies and proteins.⁷⁰

Because these tests screen for the antibodies and not the virus itself, persons infected with HIV who do not develop the antibodies will test negative. It appears that such persons are generally limited to individuals who are already immune-impaired, young children, or those only recently infected with the virus.⁷¹ False negatives may also result from errors in testing. The sensitivity of the test, i.e. the percent of infected persons it will correctly identify, is 93.4 - 99.6%.⁷² False positives may also occur. The specificity of the test, i.e. the number of negative results in a non-infected group is 98.6 - 99.6%.⁷³ By repeating the test on a positive specimen, the number of false positives is reduced but not eliminated.⁷⁴ The number of false

positives can be reduced further by using the Western Blot test to confirm the ELISA.

Economic Impact

As already mentioned, one aspect of the AIDS crisis is dealing with irrational or exaggerated fears. The law can be used to penalize people who discriminate because of such fears. It can also be used to compel people to ignore these fears. Such laws raise very emotional and political issues. Another very political issue is deciding who will pay the financial cost of AIDS.

Between 1981 and 1986 over \$1.1 billion was spent on medical care for AIDS patients.⁷⁵ Seven billion dollars were lost because of lost productivity and earnings.⁷⁶ Conservative estimates indicate that there will be over 270,000 cases reported in the United States between 1981 and 1991 at a cumulative cost of over \$8.5 billion and lost earnings and productivity of \$55.6 billion.⁷⁷ More pessimistic observers estimate over 400,000 cases with a cumulative medical cost between 37 and 112 billion dollars.⁷⁸ Medical costs per patient can be expected to increase as drugs, such as AZT, that prolong life but do not cure, are developed.

A recent survey of California hospitals estimates hospital costs between \$52,000 and \$70,000 per AIDS patient per 18 months (the average life expectancy).⁷⁹ AIDS patients stay in the hospital longer per visit and cost more per day than all other patients.⁸⁰ State Medicaid paid over 50% of these hospital costs.⁸¹ Uncollectible bills from AIDS patients were over 3 times higher than the average for all other patients, leaving the

hospital to pay for much of the care.⁸² The RAND Corporation estimates that Medicaid will pay for over a third of the medical costs resulting from AIDS between 1986 and 1991.⁸³

The medical cost of AIDS can be shifted among four pockets:

- 1) The Government (taxpayer).
- 2) The hospitals through uncollectible bills.
- 3) The patient.
- 4) Insurance.

Eighty-five percent of insured health care is provided through employment.⁸⁴ Employers providing health care benefits to their employees can seek to minimize their costs by discriminating against those infected with HIV. Most Americans do not have private, individual health insurance. For these people, when they lose their job they lose their insurance. Individual policies are usually expensive and may not even be available to a person infected with HIV. The employer and the insurance companies may benefit from employment discrimination, but the cost just shifts to the other three pockets.

In minimizing health insurance cost through discriminating against HIV-infected individuals, the employer shifts to the government the responsibility to support a potentially productive worker who may end up on the welfare rolls. Society also loses the benefit of the victim's productivity. In the case of the seropositive person who may never develop AIDS, this would be a costly and senseless waste. Current estimates indicate that there are between 1 and 1.5 million people in the United States infected with HIV (approximately 1 for every 200 people).⁸⁵ If the authorities who are pressing for mandatory testing are successful, a very large group may be subject to discrimination. In the absence

of any prohibition against employment discrimination, mandatory testing could have a significant impact on governmental budgets at all levels, assuming the government will have increased Medicaid and welfare recipients and a reduced tax base as the result of discrimination.

The impact of discrimination on the victim is also worth considering. There is the obvious loss of salary and the more significant loss of health insurance benefits when the person needs them most.⁸⁶ As AIDS becomes more prevalent in the heterosexual community, consideration of the impact on dependent family members will become more pressing. Rejecting an otherwise qualified and productive individual can also be expected to inflict a heavy psychological toll and possibly precipitate development of AIDS if self-esteem and stress are co-factors, as some suggest.⁸⁷

From a public health point of view there is no evidence that society will benefit or be protected by removing the HIV-infected person from the work force.

Against these considerations it must be kept in mind that by forcing an employer to hire an otherwise qualified HIV-infected individual we are interfering with his right to hire and fire who he wants, and run his business as he wants. There is precedent for this in civil rights acts, but in our "free" society further incursions on traditional rights are not readily adopted. Some commentators, however, argue that the "employment at will" concept is out of date in modern industrialized society and advocate a "just cause" requirement in all employment hiring and firing decisions.⁸⁸

If the employer is unable to avoid sharing a portion of the cost of AIDS through job discrimination, he will naturally attempt to shift the burden to the consumer of his product or service to the extent the market will allow. The consumer instead of the taxpayer will foot the bill in such cases.

The financial burden can be further adjusted by prohibiting insurance companies from adjusting the rates of employers with HIV-infected personnel.⁸⁹ The insurance companies would have to cover the added risk by increasing their rates in general, passing the risk to the general insurance pool.

FEDERAL LAW ON EMPLOYMENT DISCRIMINATION

Traditionally, employment was at will.⁹⁰ An employer could reject a job applicant or fire an employee for any reason unless limited by an employment contract.⁹¹ Legislation and judicially developed employment law have modified this general rule in many circumstances. The Civil Rights Act of 1964⁹² prohibits employment discrimination based on race, color, religion, sex, and national origin.⁹³ The Act has broad application, applying to all employers in an industry affecting commerce who have 15 or more employees.⁹⁴ The Age Discrimination in Employment Act of 1967⁹⁵ prohibits employment discrimination based on age.⁹⁶ The Act also entitles employees aged 65 through 69 to coverage under group health plans under the same conditions as any other employee.⁹⁷ The Act applies to all employers engaged in an industry affecting commerce who have twenty or more employees.⁹⁸ Neither of these Acts prohibit employment discrimination based on the medical or physical condition of the employee or job applicant.⁹⁹ No con-

stitutional protections or common law rights specifically protect the handicapped from discrimination.¹⁰⁰

In 1973 Congress passed the Rehabilitation Act¹⁰¹ affording the handicapped limited protection from employment discriminations. Although not enacted with the express intention to cover a phenomenon like AIDS, the Rehabilitation Act and its counterparts enacted by the States have become the prime means by which persons with HIV infection and AIDS seek protection.¹⁰²

THE REHABILITATION ACT OF 1973

Legislative History and Purpose.

The Rehabilitation Act followed from legislation that had its origin in 1920, directed toward rehabilitation programs for disabled veterans of World War I and victims of industrial accidents.¹⁰³ Amendments in 1943, 1954, 1965, 1967, and 1968 funded research, extended benefits and expanded the class of persons eligible for rehabilitation services.¹⁰⁴ There were no provisions concerning employment discrimination until the 1973 Act.

The bulk of the Rehabilitation Act of 1973 deals with vocational rehabilitation services, research and training, and the establishment of the National Council on the Handicapped. Title V, at the end of the Act, entitled "Miscellaneous Provisions" includes three sections on employment discrimination, sections 501,¹⁰⁵ 503,¹⁰⁶ and 504.¹⁰⁷ The underlying purpose of these sections is to guarantee the "employability, independence, and integration into the workplace" of individuals with handicaps.¹⁰⁸ The legislative history on these sections is not detailed, but the

Courts construing the Act have discussed three basic legislative concerns regarding discrimination against the handicapped:

1) All the money spent on rehabilitation would be wasted if employers unreasonably refused to hire the handicapped.¹⁰⁹

2) Employers receiving federal funds or contracts should bear some of the cost in the effort to provide work for the handicapped.¹¹⁰

3) The handicapped should be protected from unreasonable biases, prejudices, fears, and insensitivities, and receive evenhanded treatment in the job market.¹¹¹

Overview of the Act

The statutory scheme. Section 501¹¹² of the Act requires each department of the executive branch of the Federal government to submit affirmative action programs for the hiring, placement, and advancement of handicapped individuals¹¹³ This section has been construed to prohibit discrimination by the executive branch,¹¹⁴ but has been the subject of limited litigation because, until recently, most jurisdiction did not recognize a private right of action under its provisions.¹¹⁵ The Equal Employment Opportunity Commission has promulgated regulations interpreting section 501.¹¹⁶

Section 503,¹¹⁷ with some exceptions, requires that contracts with the federal government in excess of \$2,500 include provisions that the contractor take affirmative action to hire the handicapped.¹¹⁸ This section, like section 501, has been construed to prohibit employment discrimination against the handicapped.¹¹⁹ A private right of action under section 503 is not generally recog-

nized.¹²⁰ Enforcement of section 503 lies with the Office of Federal Contract Compliance (OFCCP) in the Department of Labor.¹²¹ OFCCP has also promulgated regulations interpreting section 503.¹²²

Section 504 prohibits discrimination by the executive branch of the Federal government,¹²³ recipients of Federal financial assistance,¹²⁴ and recipients of Federal Revenue Sharing payments¹²⁵ from discriminating against individuals with handicaps.¹²⁶ The Department of Health and Human Services has issued regulations supplementing section 504.¹²⁷ The Attorney General has enforcement responsibility for violations of section 504.¹²⁸ A private right of action is recognized under section 504 which may be pursued regardless of the actions of the Attorney General.¹²⁹ Consequently, section 504 has received much more attention than section 501 and 503 in the courts.

Elements and defenses. There are four elements to a case brought under sections 501 or 504 of the Rehabilitation Act:¹³⁰

1) The plaintiff must be an individual with handicaps, a history of handicaps or perceived to be handicapped.

2) The plaintiff must be otherwise qualified for the job at issue.

3) The plaintiff was discriminated against solely by reason of the handicap(s).

4) The employer is the executive branch of the Federal government or a recipient of either federal financial assistance or revenue sharing payments.¹³¹

In the context of HIV/ARC/AIDS each of these elements could be the basis for controversy. The first two elements, however, raise unique considerations when applied to HIV/ARC/AIDS cases. The crux of the first element is proving that HIV-infection, ARC, or AIDS is a handicap under the statute. Once a jurisdiction recognizes a particular condition as a handicap, subsequent plaintiffs with the same condition will only have to prove they have the condition.¹³² Consequently, the case of first impression in each jurisdiction determining the status of HIV infection, ARC and AIDS under the statute will in effect either open or close the door to future plaintiffs with these conditions. Commentators generally predict that AIDS will be considered a handicap.¹³³ The few district court decisions that have dealt with this issue confirm these predictions.¹³⁴ We are still, however, "reading tea leaves on [how the courts will decide] the issue of the asymptomatic carriers."¹³⁵

The second element of the plaintiff's case requires a showing that the handicapped plaintiff is qualified for the job in spite of his handicap.¹³⁶ The courts generally look to see if the plaintiff is able to perform the essential functions¹³⁷ of the job, with reasonable accommodation if necessary,¹³⁸ without endangering himself or others.¹³⁹ The burden of establishing some aspects of this element is often shifted to the defendant.¹⁴⁰ One method of shifting the burden of showing that the plaintiff is not a danger to himself or others is to characterize this as a defense to being otherwise qualified.¹⁴¹ Other defenses based on business justifications relate to efficiency and economic hard-

ship.¹⁴² The non-safety defenses generally meet with very limited acceptance unless related to accommodation.¹⁴³

In cases involving individuals infected with HIV, safety and economics will be the prime issues. The main safety issue concerns the risk of transmitting the virus to co-employees or customers. Given the limits to our understanding of the transmission of the virus, whoever has the burden of showing there is or is not a risk will have a difficult time. If the burden is on the employer and he is unable to prove that there is a substantial risk, then, in effect, the individual's co-workers and customers will assume what the courts consider a nonsubstantial risk.

The third and fourth elements of the plaintiff's case raise no unique issues in the AIDS context.¹⁴⁴ The fourth element substantially limits application of the Act.¹⁴⁵ The vast majority of commercial employers remain unaffected by the Federal statute. Nonetheless, the Federal law is of critical importance to most employers because most state handicap discrimination laws are patterned after the Federal statute.¹⁴⁶ Federal court decisions can be expected to influence state court interpretations of their own acts.

Who is a Handicapped Individual

The threshold requirement to assert a discrimination claim under the Rehabilitation Act is that the claimant is handicapped.¹⁴⁷ The Act, as amended and expanded in 1974, defines a handicapped individual as:

any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record

of such an impairment, or¹⁴⁸ (iii) is regarded as having such an impairment.

The expanded definition sought to extend protection to people who were not currently handicapped but who had recovered from a handicap or who were erroneously perceived as being handicapped.¹⁴⁹

The statute has been construed as requiring a two-pronged analysis in defining a condition as a handicap: 1) there must be an impairment, and 2) the impairment must substantially limit a major life activity.¹⁵⁰ What constitutes an "impairment," a "major life activity," and a "substantial limit" have been analyzed with various results in many cases.¹⁵¹ Regulations supplementing sections 501,¹⁵² 503,¹⁵³ and 504¹⁵⁴ have defined these concepts in general terms, leaving courts wide latitude in their application. Impairment is defined as:

any physiological disorder or condition, cosmetic disfigurement,¹⁵⁵ . . . , affecting one or more of the following body systems: neurological,¹⁵⁶ respiratory,¹⁵⁷ . . . , hemic and lymphatic.^{158,159}

The regulations supplementing section 503 define a person as "'substantially limited' if he or she is likely to experience difficulty in securing, retaining, or advancing in employment."¹⁶⁰ Major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working [emphasis added]."¹⁶¹ Courts have shown considerable deference to these regulatory definitions when there is a dispute over a condition being a handicap.¹⁶²

Given the many and varied manifestations of an HIV infection, it is helpful to analyze the handicap status of seropositives, ARC victims and AIDS victims separately.¹⁶³

The courts, administrative agencies, and commentators that have considered the issue generally hold that individuals with AIDS are handicapped.¹⁶⁴ This is because AIDS is a disorder of the hemic and lymphatic systems and also because the opportunistic infections associated with an AIDS diagnosis involve disorders of other body systems. The AIDS victim is substantially limited in a major life activity because of the debilitating effects of the opportunistic infections and cancers. Even if the individual is not currently afflicted with a debilitating infection, the high probability and imminence of developing a disabling infection or cancer warrants classification as a handicap. Courts generally have not distinguished between handicaps that are disabling at all times (e.g., blindness) and those that disable the person periodically (e.g., epilepsy). Consequently the fact that the AIDS victim may experience periods of health will not disqualify him from handicap status.

The more difficult case to decide is the seropositive individual. The Supreme Court recently declined to consider this issue when given the opportunity.¹⁶⁵ A Federal district court has held that HIV infection alone is a protected handicap.¹⁶⁶ The court demonstrated either ignorance or indifference to the distinction between AIDS and seropositivity.¹⁶⁷ Another Federal district court held that seropositivity is a perceived handicap.¹⁶⁸

Neither of these case engaged in the detailed analysis seen at the appellate level in deciding whether a condition is a handicap.

The ARC victim falls between the AIDS victim and the seropositive individual. If HIV infection alone is a handicap, ARC must be a handicap. If HIV infection is not a handicap, the ARC victims may have to establish their status as handicapped on a case-by-case basis.

In general, the number of cases where the definition of handicap has been in question is limited. Among those cases, tuberculosis,¹⁶⁹ congenital back anomaly,¹⁷⁰ drug addiction,¹⁷¹ personality disorder,¹⁷² and hypersensitivity to tobacco smoke¹⁷³ were considered handicaps, while weight,¹⁷⁴ left-handedness,¹⁷⁵ cross-eyedness,¹⁷⁶ transitory illness,¹⁷⁷ fear of heights,¹⁷⁸ varicose veins,¹⁷⁹ and sensitivity to tobacco smoke¹⁸⁰ were not handicaps.

The focus and emphasis of the courts in this area has varied. Some key on impairment,¹⁸¹ others on substantial limitations,¹⁸² and others spend little time on the question of handicap and determine the case instead by analyzing whether the person is qualified for the job.¹⁸³ In reaching their results, the courts generally try to effect what they perceive as the legislative purpose of the Act, to protect people from unreasonable discrimination. The court can expand or contract the size of the group entitled to protection by how it chooses to define handicap. Nothing in the statute, the regulations, or binding precedent currently dictates how a court should decide the handicap status of ARC victims or seropositive individuals.

There are several ways a court might analyze seropositivity if it were inclined to recognize it as handicap. These analyses will be considered under the two prongs of the definition of handicap.

Prong 1: Impairment.

Job factor = Impairment. For the plaintiff, the most favorable definition of impairment, equates impairment to any condition considered as negative by an employer in hiring or firing decisions. E. E. Black, Ltd v. Marshall,¹⁸⁴ provides one of the more detailed decisions advancing this theory. Black involves a man with a back anomaly who was denied employment as an apprentice carpenter because of his back.¹⁸⁵ In reaching its conclusion that the man was handicapped the court noted that not only is a bad back an impairment, but possessing average or normal physical abilities is also an impairment when seeking a job where the employer is seeking above average abilities.¹⁸⁶ As an example the court discusses a short persons desire to play professional basketball. The only thing that saves professional teams from a discrimination suit' is the inability of the person of average ability to show that they are otherwise qualified for the job.¹⁸⁷ In effect, the court eliminates the requirement of proving impairment. The Black court's definition of "substantially limits a major life activity" is almost as generous to the plaintiff.¹⁸⁸ A literal reading of Black renders the word "handicap" meaningless, transforming the Rehabilitation Act into a universal discrimination law, imposing a "just cause" requirement for all hiring and firing decisions.¹⁸⁹

Other courts have cited much of Black with approval, but have rejected the court's all inclusive definition of impairment.¹⁹⁰ Most courts do not consider minor defects or normal human limitations as impairments.¹⁹¹

The seropositive individual is not physically impaired by the virus in anyway. Consequently, unless a court is willing to accept the Black analysis, a seropositive person is not currently impaired under the normal use of the word.

Potential Impairment = Impairment or Perceived Impairment.

The seropositive individual may not suffer from a current impairment but he certainly has the potential to develop an impairment. No Federal court has considered whether a potential impairment is the same as an impairment. Two state courts construing state law have rejected potential impairments as handicapping, while one state court held the opposite position.¹⁹¹ The North Carolina Supreme Court has held that "[f]airly construed . . . the statute [is] intended to aid only those who are presently disabled. [Emphasis added.]"¹⁹² The California Supreme Court, in finding hypertension to be a handicap, stated, "to limit 'handicap' to present disabilities would defy logic."¹⁹³ Obviously a court can go either way on this issue.

In a recent Federal district court case, the court held "[i]n the present period of speculation and concern over the incurable and fatal nature of AIDS, there is no doubt that a known carrier of the virus is perceived to be handicapped."¹⁹⁴ It is not clear if the court is assuming that this perception exists because of the potential impairment, because of the contagion, or because it

assumes everyone is ignorant of the difference between AIDS and seropositivity.

If potential impairment equals impairment or perceived impairment, the seropositive person would be impaired, but an injustice will have been done to the English language. Equating potential impairment to impairment will also significantly enlarge the class of people entitled to protection under the Rehabilitation Act. There are reasonable arguments that had Congress foreseen the potential impairment issue arising they would have included it in the definition.¹⁹⁵ To those who believe it is the prerogative of the courts to decide cases based on Congressional intent instead of what Congress said, the insult to the language may be justified. One should keep in mind, however, that Congress has made two substantive amendments to the employment provisions of the Rehabilitation Act since 1973,¹⁹⁶ indicating that Congress is sensitive to changing needs in connection with the Act.

Contagiousness as an Impairment. Commentators have argued that contagiousness should be considered a handicap.¹⁹⁷ Although recognizing that the seropositive individual is not directly physically impaired by his contagiousness, he is indirectly impaired because people will consider contact with him dangerous and treat him accordingly. Some see support for this position in the recent Supreme Court decision holding that discrimination against someone with a disabling and contagious disease, solely because of the contagion, is just as unlawful as discriminating against them because of the disablement. The Court, referring to AIDS, however, expressly refused to opine on whether someone who

is only contagious is handicapped.¹⁹⁸ This is just another attempt to stretch the definition of impairment beyond its normal limits.

Conclusion on Prong 1: The bottom line is that we are dealing with a statute that did not foresee a phenomenon like AIDS. Attempting to find the answer in the plain meaning of the words of the statute guarantees neither a just result nor fulfillment of the legislative intent.

The issue could easily be resolved by the legislature.¹⁹⁹ In the alternative, the courts will be called upon to determine the scope of coverage. I would suggest that the problem be faced by deciding whether "impairment" includes "potential impairments." If it does, seropositive individuals would be impaired. It would also include individuals who are genetically at risk of developing heart disease, cancer, alcoholism, and various other maladies. Medical science is now revealing that a prime factor in many of these conditions is genetic. Technology is developing that will allow us to identify those at risk. Just as the ELISA test opened the door to discriminating against seropositives, the new genetic technology could be the start of discrimination against those with less than perfect genes.

By examining the statutory definition, it is obvious that it applies to persons with current impairments, past impairments, and perceived impairments. There is no express mention of potential impairments. The fact that Congress provided for those with past and perceived handicaps indicate that there is nothing magic about actually having a handicap. Congress was interested in spreading

the cost of employing the handicapped and maximizing the productivity of the handicapped by integrating them into society.²⁰⁰ Does it make sense to prohibit discriminating against someone mistakenly perceived as handicapped and not to prohibit it against someone who is likely to become handicapped? Discriminating against the handicapped in advance of their becoming handicapped will make it all the more difficult to integrate them into society and the workplace when the potential handicap becomes reality. In the meantime, society will have lost the benefit of their productivity, and the employer who sought to avoid the economic consequence of hiring an employee who might go from seropositive to AIDS, may now be forced to hire the very individual he rejected when healthy.

This argument is not as relevant if the motive behind the discrimination is fear of contagion. If a court decides for economic reasons that it serves the Congressional intent to consider a potential impairment as an impairment, the actual motive for the discrimination in each case becomes irrelevant so long as it relates to the potential impairment.²⁰¹ Fear of contagion is related to the potential impairment.²⁰²

A problem could arise if it becomes possible either to identify those seropositives who are likely to develop AIDS or ARC, or to prevent some seropositives from developing AIDS or ARC. We now have a class of people who are not potentially impaired and may therefore be discriminated against. Attempts to protect this class, however, would move further in the direction of prohibiting all unreasonable discrimination and requiring just

cause for all hiring and firing decisions. Perhaps the AIDS phenomenon will become the springboard for a universal employment discrimination law in the United States.

Prong 2: Substantially Limits Major Life Activity.

Much of the discussion under Prong 1 implied that once you have a recognized impairment you are handicapped. In some jurisdictions this can be the case where the courts say minor impairments are not really impairments, so any impairment, by definition, substantially limits a life activity.²⁰³ In theory, however, the plaintiff must establish that any impairment substantially limits a major life activity.²⁰⁴

It is generally held that if an impairment causes difficulty in obtaining satisfactory employment it substantially limits a major life activity.²⁰⁵ Some question remains as to how much difficulty there must be and what "satisfactory employment" means. The most favorable approach for the plaintiff is holding that rejection at even one job constitutes difficulty, and that "satisfactory employment" is measured by the plaintiff's expectations.²⁰⁶ The more common approach requires consideration of the number and type of jobs from which the plaintiff is restricted, the geographic area to which the plaintiff has access, and the job expectations of the plaintiff.²⁰⁷ No court appears to require a showing that the plaintiff has been denied employment from several employers. Instead, the courts appear willing to speculate whether or not the plaintiff is likely to encounter problems or if the plaintiff is being unreasonably particular about the job he wants. In practice, this prong is used to screen out what might

be called frivolous suits involving relatively healthy and generally very employable individuals who demand that they be accommodated in a particular job when similar jobs requiring no accommodation are available. The second prong would probably never prove fatal to a plaintiff's case before a sympathetic court.

The second prong can also be used as another approach to the "otherwise qualified" issue. If an impairment only restricts an individual from a particular kind of job the court may find that he is not substantially limited.²⁰⁸ This could apply in some cases to HIV/ARC/AIDS when a person is restricted from certain select jobs, such as surgeon, dentist, or chef.

Otherwise Qualified

A handicapped individual is not protected against discrimination unless he is "otherwise qualified" for the job.²⁰⁹ This generally means that the plaintiff must be able to perform the essential functions of the job, with reasonable accommodation, if necessary, without endangering himself or others.²¹⁰ Courts vary on how they allocate the burden of establishing or rebutting each aspect of this element.²¹¹ In all jurisdictions, the plaintiff must show that he can perform the essential functions of the job but for his handicap, i.e. he has the requisite education, training, and experience.²¹² Some courts then shift the burden to the employer to prove that the plaintiff's handicap somehow prevents him from doing the job and that there is no way to reasonably accommodate the plaintiff.²¹³ Some courts require the plaintiff to assume more of the burden in showing that he can

safely perform the job or that he can be reasonably accommodated.²¹⁴

A defense of business necessity may also be available to some employers when they refuse to hire a handicapped individual. In most jurisdictions these defenses involve safety or efficient performance of the essential functions of the job and, in effect, merely shift the plaintiff's burden of proving that he is qualified, to the employer to prove that he is not qualified.²¹⁵ Some cases, however, imply that a court may be willing to consider factors bearing on business necessity that are not directly related to the plaintiff's ability to perform the job. These become particularly important in the HIV/ARC/AIDS context where some of the employers' prime concerns involve collateral economic cost of hiring or maintaining an employee who may generate large medical expenses.

The main issues under the "otherwise qualified" element that arise in the HIV/ARC/AIDS context can be broken down as follows:

- A. Safety concerns
 - 1. Risk of transmitting the virus
 - 2. Risk of the infected person contracting a disease
 - 3. Risk of industrial accidents
- B. Economic concerns
 - 1. Insurance and fringe benefit cost
 - 2. Absenteeism
 - 3. Low productivity
 - 4. Short career potential
 - 5. Disruption of the work place or co-worker preference
 - 6. Loss of customers or customer preference.

Safety: The Risk of Transmitting HIV or OIs. In School Board of Nassau County v. Arline²¹⁶ the Supreme Court held that "a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise

qualified for his job if reasonable accommodation will not eliminate that risk."²¹⁷ In deciding if the risk is significant a court must consider: 1) how the disease is transmitted, 2) when the person is contagious, 3) the severity of the risk, and 4) the probability of transmission.²¹⁸ In evaluating these factors, courts should defer to "the reasonable medical judgments of public health officials."²¹⁹

Given the mode of transmission and the low probability of transmission, according to public health officials, it would be difficult to consider an HIV carrier a significant risk to others unless the court decides that the severity of the risk overshadows the low probability.²²⁰ Courts have also shown reluctance to rely blindly on the assurance of public health officials and have been unwilling to assume that the risk of transmission is minimal given the limitations to our understanding of the disease.²²¹ Consequently, the HIV carrier may be considered a substantial risk in spite of public health officials' position on the low risk of transmission.

The Supreme Court's standard does not consider an employer's tort law duty for the safety of his customers. By having one responsibility regarding employing the handicapped and a different duty toward customers, the stage is set for a customer suing an employer for negligently hiring a person whom the Rehabilitation Act required to be hired.²²²

The formula in United States v. Carroll Towing Co.,²²³ of $B \times P \times L$, could offer an alternative to the Arline analysis of substantial risk. Under this formula, if B, the burden to society

and the individual in not being hired or retained is less than P, the risk of transmission, times L, the severity of the consequence of transmission, then discrimination is legal. This formula takes into account both the employer's duty under tort law to his customers and the Congressional interest in employing the handicapped balance against public health concerns. This approach is not only more suited to effect the legislative purpose of the Act, but it also provides a court with additional flexibility in deciding cases. For example, a court might decide that there is some risk short of substantial that an infected individual will transmit the virus as a food handler. Under the Supreme Court approach the analysis ends and the individual is qualified to be a food handler. Under the Carroll formula the court can go on to consider the plaintiff's ability to find different employment where there is even less risk of transmitting the virus.

The AIDS victim with opportunistic infections (OIs) poses a slightly different case. Most of the OIs which afflict an AIDS victim are either difficult or impossible to transmit or, if transmitted, they are not a threat to a healthy person.²²⁴ If the AIDS victim has active tuberculosis or some other contagious and potentially dangerous infection it will have to be assessed under the criteria announced by the Supreme Court in Arline.²²⁵ Because the OIs that most AIDS victims contract are not a threat to others,²²⁶ it would be unreasonable to expect that any presumption that AIDS victims are unsafe because of opportunistic infections would withstand judicial scrutiny.²²⁷ Instead, a case-by-case inquiry will be necessary to assess the risk of transmitting

the particular infection. This illustrates another problem facing the employer. He may be under a duty to continuously monitor the health of employees with AIDS so he can take steps to protect his other employees and customers should the victim develop a contagious and dangerous opportunistic infection. This increases business costs and raises employee privacy issues.

Safety: Risks to seropositive or immune-depressed persons.

Three factors are considered by courts in assessing whether safety risks will justify discriminating against a handicapped person: 1) the likelihood of harm, 2) the seriousness of the possible harm, and 3) the imminence of harm.²²⁸ These factors apply whether the risk is to the individual or to others. The standard announced in Arline,²²⁹ discussed above, is just a more specific application of these general rules when the harm involves the risk of transmitting a contagious disease.

The seropositive individual's immune system has not been compromised, so he faces no particular risk of contracting diseases in the work place. The seropositive person, however, faces the risk of developing ARC or AIDS. Our understanding of what precipitates the development of ARC/AIDS is limited, but the co-factors associated with it are not peculiar to most work settings.²³⁰ The employer generally has the burden of proving that the handicapped individual's safety is at risk.²³¹ Based on the available medical data the employer would be hard pressed to satisfy that burden. Courts generally disfavor paternalistic behavior towards the handicap.²³² If the handicapped person is willing to assume reasonable risks the court will support his

choice and prohibit "well intentioned" discrimination. Not all risks will necessarily be considered reasonable. For example, an employer may be justified in rejecting a seropositive individual for employment in areas or under conditions where adequate medical resources are not readily available should the person develop AIDS.²³³

Contrary to some popular misconceptions, the immune system of the ARC and AIDS victims is not destroyed. The immune system depends on different components to accomplish various missions. The immune system of the person with AIDS is no longer able to perform some of those essential tasks. The body is then vulnerable to the diseases that are controlled by the compromised portion of the immune system, not to all diseases.²³⁴ For example, the AIDS victim is not at risk of dying from a cold he catches from a co-worker. Many of the opportunistic infections that develop in the ARC/AIDS victim are found in everyone but are controlled by the immune system. We do not understand the origin or pathogenesis of all the opportunistic infections and cancers associated with AIDS, but there is no current evidence linking the majority of them with the work place. Nevertheless, certain exceptions do exist. For example, one disease presents a hazard for outside construction workers in portions of the southwest United States where a fungus found in the dust can be inhaled if the dust is stirred up and cause an infection.²³⁵ Jobs requiring certain live virus vaccinations may also pose a risk,²³⁶ as do jobs requiring prolonged travel in certain African and tropical

areas.²³⁷ The State Department and military have used both these justification in discriminating against ARC and AIDS victims.²³⁸

For the majority of jobs it does not appear that the ARC or AIDS victim will be at any special risk of contracting or aggravating a disabling disease in the work place. The burden will be on the employer to show that the person is at risk. Current medical evidence would not support any presumptions that persons with AIDS or ARC are at any special risk in the work place.

Safety: Risk of injury. The same factors considered for the health risk of the handicapped individual apply to general risks associated with industrial activity. The seropositive individual is not at any increased risk of being injured or injuring others. Should the seropositive person be injured, it is unknown if the trauma can precipitate the development of ARC or AIDS.

The ARC or AIDS victim may suffer from fatigue, loss of stamina, distracting discomfort, or even compromised mental function.²³⁹ Jobs operating or working near dangerous equipment may present a risk to some AIDS victims and their co-employees. Each person, however, is different, and it is not reasonable to presume that all ARC and AIDS victims pose a substantial risk in such environments. Without the benefit of any recognized presumptions the employer will have to assess and monitor the health of employees with ARC or AIDS in dangerous work settings and co-employees will assume any risk not rising to the level of substantial. Where safety depends on the ARC/AIDS victim's attentiveness, an employer may be under a duty to monitor his health so he can intervene if the worker's health endangers himself or others.

Economics: Insurance and Fringe Benefit Costs. A reasonable concern of employers will be the potential cost the HIV infected individual will impose on health and life insurance programs. There is no Federal precedent to support a defense based upon this concern. In fact, there is evidence that any such defense would be rejected. The Employment Retirement Income Security Act (ERISA)²⁴⁰ prohibits discharging an employee based on the potential impact the employee's medical condition would have on a covered benefit plan.²⁴¹ The Age Discrimination Employment Act prohibits providing different fringe benefit plans to older employees than to younger employees.²⁴² Employers' complaints about increased medical cost for female employees because of pregnancy have also met a deaf ear.²⁴³ Finally, employers have been barred in some jurisdictions from offering handicapped employees reduced insurance coverage.

The states considering this defense have rejected it.²⁴⁴ In the few cases where cost arguments of this kind were given a sympathetic ear, the court decided the case by holding the person was not handicapped, never reaching the business necessity defense.²⁴⁵

It seems unreasonable to dismiss employer financial concerns out of hand. The increased cost to health and life insurance programs are a collateral cost of employing the handicapped. Costs necessary to accommodate a handicapped person are also collateral costs. An employer is not required to employ a handicapped person if the accommodation costs are unreasonable.²⁴⁶ In deciding the reasonableness of these costs, courts consider the

size and type of the employer's operation, including the number of employees and budget, as well as the nature and cost of the accommodation.²⁴⁷ Courts have not characterized insurance costs as accommodation costs. There appears to be little reason to treat insurance costs differently from other collateral costs associated with hiring the handicapped. If the magnitude of the cost of insuring the HIV infected individual is large enough, the courts could use the accommodation analysis to permit an employer to discriminate. This might allow smaller or less prosperous employers to avoid potentially devastating collateral costs. Even from the perspective of handicapped individuals as a group, it would be more fair to consider insurance costs as any other accommodation cost. It makes little sense to the person in a wheel chair who is denied a job, because it will cost the employer \$1,000 to accommodate him, to see an AIDS victim get the job who might cost the employer tens of thousands of dollars.

Jurisdictions may avoid this entire issue by enacting laws that prohibit insurance companies from pegging their rates to the HIV status of the insured.²⁴⁸ Insurance companies are designed to absorb and redistribute risks of this nature while employers generally are not.

Economics: Absenteeism, Low Productivity, and Short Career.

Presumptions that handicapped people will have absenteeism and productivity problems have met with disfavor.²⁴⁹ If absenteeism and low productivity actual occur, a handicapped employee may be discharged.²⁵⁰

There is no evidence that a seropositive individual will be an unusually high risk in this area. The risk the ARC/AIDS victim poses will depend on his current condition. In order to justify discrimination because of short career potential, the employer would have to show that this is a bona fide occupational requirement and not just a desirable qualification.²⁵¹

Economics: Disruption of Workplace/Co-employee Preference.

Fear of AIDS can have a substantial impact on a business because of the reaction of other employees. No matter how much you educate and no matter how conclusive the evidence, a number, if not the majority of people, will to some degree avoid the infected individual. If an infected individual must work closely with others or with the cooperation of others, tensions can be expected to arise.²⁵² The work and morale of all concerned may be affected. The non-infected worker may suffer stress related illness because of his fear and successfully seek worker's compensation.²⁵³

Co-employee preference has never been recognized as an excuse for discrimination.²⁵⁴ Fear is different from prejudice, and an employee has a right to work in a safe environment. Non-infected workers might refuse to work around an infected person claiming conditions are abnormally dangerous under either a labor contract, section 7 of the National Labor Relation Act,²⁵⁵ section 502 of the Labor and Management Relation Act,²⁵⁶ or the general duty clause of the Occupational Safety and Health Act.²⁵⁷ Under some circumstance the subjective beliefs will justify such refusal in spite of the objective evidence disproving these beliefs.²⁵⁸

The employer may find himself in a no-win situation. If he hires or retains an infected employee, other employees may stop working. If a court finds that their subjective beliefs are held in good faith or there is some reasonable basis for their fear, the employer cannot discipline them.²⁵⁹ If the employer fires the infected employee, he may be successfully sued under the Rehabilitation Act. The safety standard under the Rehabilitation Act merely requires that the infected person not pose a substantial risk to others, which is not the same standard utilized in deciding if the person is otherwise qualified. The potential for contradictory results is obvious when the fearful employee needs only establish a subjective, good faith basis for the fear. Even under an objective standard there is no guarantee that a court will not find sufficient risk to to justify a walkout, but not substantial risk justifying termination of the infected employee. It would not be the first time that an employer would be damned if he does and damned if he does not.²⁶⁰

One partial solution is to educate employees about the limited risk of transmission of the virus in the work place. This may eliminate some of the fear and it will also serve to undercut any good faith subjective fears. If this fails, the employer must take his chances and either fire the infected employee or discipline the fearful ones. It is too soon to tell which decision poses the lesser legal risk.

Economics: Loss of customers/Customer preference. Fear of AIDS can also cause customers to avoid a business with infected employees. Cases under the Civil Rights Act have refused to

recognize customer preference as a justification for discrimination.²⁶¹ The courts note that the Civil Rights Act was passed not only to overcome the prejudice of employers but also those of the public at large.²⁶² With AIDS we are generally dealing with fear, not prejudice or hate. Fear is a different emotion from hate and ought to be given greater consideration by any tribunal that is thinking to suppress it. If the fear is totally unreasonable, it may warrant little consideration. Fear of contracting HIV cannot be said to be totally unreasonable given the current deficiencies in our knowledge and understanding of the disease. These factors distinguish HIV discrimination from racial discrimination, suggesting there should be some room to consider customer preference when it comes to fear of contracting a disease.

I would propose that customer preference based on safety be allowed as a defense to firing a contagious individual. Abuse of this defense can be limited by requiring the employer to prove that there has been an actual loss of business creating an undue hardship. Presumptions that business would suffer generally should not be entertained. By using the undue hardship standard the employer is protected from incurring any costs or suffering a loss beyond what he would be expected to sustain from accommodating a handicapped person in the usual sense of the word.

Conclusion: "Otherwise Qualified". The safety issues concerning AIDS require the courts to develop standards for assessing the risks of transmission of a deadly disease at a time when the disease is not fully understood. On the one hand, better-safe-than-sorry is not a reasonable judicial approach, given the

potential magnitude of the discrimination problem. On the other hand, blind reliance on public health official assurances of safety may also be premature. A cautious approach, giving due regard to current medical opinion, while balancing the legitimate needs of the employer, society, co-workers, customers, and the HIV/ARC/AIDS victim on a case-by-case basis, may be in order.

The potential economic consequences of AIDS are staggering. Employers understandably want to avoid being saddled with a portion of the health care and disability costs. Unfortunately, in most jurisdictions, the best way to avoid this is to discriminate against those infected with HIV. As consequence, society not only gets stuck with the health care bill but also must support healthy and capable individuals. If the estimates of 1.5 million seropositive individuals in the United States is correct, and if mandatory testing becomes more pervasive, we are going to have a large group of people who encounter employment discrimination. It makes sense from society's point of view to force the employer to hire these people. Given the structure of employment benefits in this country, this also forces the employer, and through higher prices, the public to assume increased insurance costs. Employers may not be the best pool to shift these costs. Legislation shifting this risk to the general insurance pool has been enacted or is being considered in several states.²⁶³ In the absence of legislation, employers who can demonstrate undue hardship from increased insurance or benefit costs from employing the handicapped should be allowed to discriminate. This should require actual documentation and not speculation.

FOOTNOTES

1. Pneumocystis Pneumonia -- Los Angeles, 30 Morbidity and Mortality Weekly Report 250-252 (1981). Opportunistic infections (OIs) are infections that are either not found or produce only mild illnesses in individuals with normal immune systems. The infections can be caused by bacteria, viruses, fungi, protozoa, and other parasites. See, Answers About AIDS, A Report of the American Council on Science and Health, 5 (3d ed. 1986) [hereinafter cited as Answers].

2. Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men -- New York City and California, 30 Morbidity and Mortality Weekly Report 305-308 (1981). In retrospect AIDS cases from 1978 through 1981 have been identified. Answers, supra, note 1, at 9.

3. W. Curran, L. Gortin & M. Clark, Acquired Immunodeficiency Syndrome: Legal and Regulatory Policy, U.S. Department of Commerce, National Technical Information Service, 222 (1986) [hereinafter cited as Curran]; Update on Acquired Immune Deficiency Syndrome -- United States, 31 Morbidity and Mortality Weekly Report 507-514 (1982).

4. Curran, supra, note 3, at 222-223. Before HIV was isolated and identified as a necessary agent in the development of AIDS, the CDC definition of AIDS was premised on the diagnosis of particular diseases indicative of underlying cellular immune deficiency. The current definition has added additional diseases and requires that the patient be HIV positive. The diseases include:

A. Cancers

1. Kaposi Sarcoma (second most common disease in AIDS victims)

2. Primary Lymphoma of brain

B. Protozoal and helminthic infections

1. Cryptosporidiosis

2. Pneumocystis carinii pneumonia (most common disease in AIDS victims)

3. Strongyloidosis

4. Toxoplasmosis

C. Fungal infections

1. Aspergillosis

2. Candidiasis

3. Crptococcosis

D. Bacterial infections

1. Atypical mycobacteriosis

E. Viral infections

1. Cytomegalovirus

2. Herpes simplex

3. Progressive multifocal leukoencephalopathy.

See, Classification System for HTLV-III/LAV Infections, 35 Morbidity and Mortality Weekly Report 335 (1986); Revision of the Case Definition of AIDS for National Reporting -- United States, 34 Morbidity and Mortality Weekly Report 373-375 (1985). If a patient fits the surveillance definition it is reported to CDC.

5. Answers, supra, note 1, at 5.

6. Id., at 5-6.

7. Review of the Public Health Service Response to AIDS, Office of Technology Assessment, at 4 (February 1985) [hereinafter cited as Review]; Leonard, AIDS and Employment Law Revisited, 14 Hofstra L. Rev. 28 (1985).

8. Review, supra, note 7, at 4.

9. Answers, supra, note 1, at 5-7.

10. Id., at 5-7.

11. Curran, supra, note 3, at 230-233; Leonard, supra, note 7, at 19.

12. Answers, supra, note 1, at 8.

13. Update: AIDS - United States, 35 Morbidity and Mortality Weekly Report 757 (1986) [hereinafter cited as Update 1986].

14. Answers, supra, note 1, at 9.

15. As of 4 August 1986, however, 2 cases of AIDS from 1979 and several cases from 1980-1981 were still alive. Answers, supra, note 1, at 9.

16. A previously unidentified virus was first isolated by French scientists in 1983 from a lymph node of a male homosexual. They named the virus lymphadenopathy-associated virus (LAV). In early 1984, American scientists isolated a virus from AIDS patients and called it human T-cell lymphotropic virus type III (HTLV-III). Another group of researchers isolated a virus from AIDS patients which they called AIDS-Associated retrovirus (ARV). The three viruses were variants of the same virus which is now called human immunodeficiency virus (HIV). The popular press often refers to it as the AIDS virus. See, Answers, supra, note 1, at 10-11.

17. A retrovirus is a virus which can reverse the process of gene expression when it infects a cell. A retrovirus has only RNA and no DNA. When it infects a host cell it causes its RNA pattern to transcribe on the host cell's DNA. When the host cell's DNA replicates it creates more of the retrovirus's RNA. Review, supra, note 7, at 4.

18. Id., at 4.

19. Id.

20. Id., at 11; Curran, supra, note 3, at 230-231; Ho, Rota & Schooley, Isolation of HTLV-III from Cerebrospinal and Neural Tissues of Patients with Neurologic Syndromes Related to the Acquired Immunodeficiency Syndrome, 313 N. Eng. J. Med. 1493-7 (1985); Levy, Shimabukuro & Hollander, Isolation of AIDS-Associated Retrovirus from Cerebrospinal Fluid and Brain of Patients with Neurological Symptoms, 2 Lancet 586-8 (1985).

21. Social Security Says No to Broader AIDS Definition, 2 AIDS Pol'y & L. (BNA) No. 11, at 4 (June 17, 1987).

22. Gottlieb, Immunologic Aspects of the Acquired Immunodeficiency Syndrome and Male Homosexuality, The Medical Clinics of North America, 652 (May 1986).

23. Surgeon General's Report on Acquired Immune Deficiency Syndrome, U.S. Department of Health and Human Services, at 11 [hereinafter cited as Report]; Curran, supra, note 3, 230.

24. 100%: AMA Forum Told That HIV May Always Lead to AIDS, 2 AIDS Pol'y & L. (BNA) No. 8, at 6 (May 6, 1987);
50%: In Brief, 2 AIDS Pol'y & L. (BNA) No. 6, at 10 (April 8, 1987);
30%: Third-World Upheaval Seen Caused by AIDS, 2 AIDS Pol'y & L. (BNA) No. 11, at 3-4 (June 17, 1987);
20-30%: Answers, supra, note 1, at 21;
4-20%: Curran, supra, note 3, at 232;
4-19%: National Institute of Health Conference, The Acquired Immune Deficiency Syndrome, An Update, 102 Annals of Int'l Med. 801 (1985).

25. Gottlieb, supra, note 22, at 652. Some of the suggested co-factors include: presence of cytomegalovirus, Epstein-Barr virus, or other herpes viruses; exposure to hepatitis; iatrogenic effect of steroids and other medicines; use of alcohol and recreational drugs; cigarette smoking; antigen stimulation as a result of various sexual practices; ethnicity; particular underlying diseases; and psychosocial risk factors (e.g. life satisfaction, self-esteem, depression, coping mechanism, sense of control, social support, and stress). Review, supra, note 7, at 20.

26. Report, supra, note 23, at 10; Answers, supra, note 1, at 20-21.

27. Answers, supra, note 1, at 22-23.

28. Curran, supra, note 3, at 232. An antigen test to determine which HIV infected individuals are at immediate risk of developing AIDS is under development. Approval Sought for Antigen Test, 1 AIDS Pol'y & L. (BNA), No. 22, at 6 (1986).

29. Curran, supra, note 3, at 230. Lymphadenopathy is a disease affecting the lymph nodes which causes them to swell.
30. Mylagia is muscular pain.
31. Curran, supra, note 3, at 230.
32. Id.; Answers, supra, note 1, at 7; Report, supra, note 23, at 5-10. Some authorities separate LAS from ARC. Others define ARC as all illnesses associated with a depressed immune system which do not qualify as AIDS. Generally, the illnesses associated with ARC are not life-threatening.
33. Answers, supra, note 1, at 7. An ARC diagnosis is not as clearly defined as an AIDS diagnosis where the underlying immune disease must fit the diagnosis of one of the specified diseases. Consequently, greater variation in what physicians diagnose as ARC can be expected.
34. Curran, supra, note 3, at 232.
35. Id., at 231; Answers, supra, note 1, at 7.
36. Curran, supra, note 3, at 231; Goldstick, Mandybar & Bode, Spinal Cord Degeneration in AIDS, 35 Neurology (Cleveland) 103-106 (1985); Barnes, AIDS-Related Brain Damage Unexplained, 232 Science 1091-1093 (1986).
37. Curran, supra, note 3, at 231.
38. Id.
39. Update 1986, supra, note 13, at 758.
40. Id., at 757-758.
41. See, Note, Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance, 33 U.C.L.A. L. Rev. 1419 (1986).
42. Id.; Cf. 42 A.L.R. Fed. 189 (1979) (Refusal to Hire or Discrimination from Employment on Account of Plaintiff's Sexual Lifestyle or Sexual Preferences as Violation of Federal Constitution or Federal Civil Rights Statutes).
43. Answers, supra, note 1, at 29-30. One recent study of 4,955 HIV positive men showed 5 testing negative at a later date. It is not known, however, if the 5 men were entirely free of the virus or just the antibodies. Silberner, Crowded Sessions, Long Lines - Few Answers, 102 U.S. News & World Rep. 18 (June 15, 1987). The infected individual poses a risk even after death. There have been several cases of morticians refusing to handle AIDS victims or charging increased fees.
44. Answers, supra, note 1, at 29-30.

45. Curran, supra, note 3, at 228; Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace, 34 Morbidity and Mortality Weekly Report 682 (1985) [hereinafter cited as Recommendations].

46. Curran, supra, note 3, at 228.

47. Recommendations, supra, note 45, at 682.

48. Update 1986, supra, note 13, at 760. Lack of transmission by other body fluids may be because of low concentrations of the virus in the fluid. Curran, supra, note 3, at 228. Transmission by foodborne, waterborne, or airborne means may be limited by the virus's apparent inability to survive well in open air. Curran Morgan, Hardy, Jaffe, Darrow & Dowdle, The Epidemiology of AIDS: Current Status and Future Prospects, 229 Science 1355. But, see, Marwick, AIDS Virus Yields Data to Intensify Scientific Study, 254 J.A.M.A. 2865-2866 (1985) (HIV survived 10 days at room temperature in a petri dish).

49. But, see, Calabrese & Gopalakrishna, Transmission of HTLV-III Infection from Man to Woman to Man, 314 N. Eng. J. Med. 987 (1986) (reporting a case of a man becoming infected after repeated vaginal intercourse and heavy mouth to mouth kissing with an infected woman). See, also, Federal Prisoner Convicted for Biting Two Guards, 2 AIDS Pol'y & L. (BNA), No. 12, at 6 (1987) (Prisoner infected with HIV who bit a guard was convicted of assault with a dangerous and deadly weapon. The guard has not yet tested positive for HIV.)

50. Recommendations, supra, note 45, at 682.

51. Cf. Answers, supra, note 1, at 15-16.

52. Recommendations, supra, note 45, at 691.

53. Id., at 693.

54. Id., at 682, 693-4.

55. Id.

56. Id., 682; Report, supra, note 23, at 13.

57. Thomas v. Atascadero Unified School Dist., F.Supp., Case No. CV-86-6609-AHS (C.D.Cal. June 19, 1987) (available on WESTLAW, DCT database); La Rocca v. Dalshein, 120 Misc.2d 697, 467 N.Y.S.2d 301, 310-11 (N.Y.Sup.Ct. 1983); HIV-Positive Boy Ordered to be Returned to Class, 2 AIDS Pol'y & L. (BNA) No. 10, at 8 (1987); Minnesota Policy Bans Bias, 1 AIDS Pol'y & L. (BNA) No. 14, at 6 (1986).

58. In one survey, 1 in 4 favored quarantine for AIDS victims. Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1241 (1986). Another example is legislation authorizing quarantine. See, e.g., Colorado Governor Signs Bill Allowing 'Restrictive Measures', 2 AIDS Pol'y & L. (BNA), No. 11, at 1 (1987). School Trustee to Propose Ill Students' Segregation, 2 AIDS Pol'y & L. (BNA), No. 12, at 9 (1987) (trustee proposes special classroom for children with HIV infection). But, see, Vermonters Surveyed on Knowledge, Transmission, 2 AIDS Pol'y & L., (BNA), No. 4, at 7 (1987) (survey in Vermont where 76% of those polled would allow their children to attend classes with HIV infected child and 75% thought that employer should be prohibited from discriminating against infected individuals).

59. Hoffman, Employment Discrimination Based on Cancer History: The Need for Federal Legislation, 59 Temp. L. Q. 2-6 (1986) (discusses several studies on this subject).

60. See, generally, Slovic, Fischhoff & Lichtenstein, Facts Versus Fears: Understanding Perceived Risk, Judgement Under Uncertainty: Heuristics and Biases 463-489 (1982) [hereinafter cited as Slovic]; Kahneman & Tversky, Subjective Probability: A Judgment of Representativeness, 3 Cognitive Psychology 430-454 (1972); Tversky & Kahneman, Availability: A Heuristic for Judging Frequency and Probability, 5 Cognitive Psychology 207-232 (1973).

61. Slovic, supra, note 60, at 464. Examples of statistics not influencing risk assessment include fear of flying or lack of fear of smoking.

62. Id.

63. Id., at 465-474.

64. Curran, supra, note 3, at 226.

65. Id.

66. Id.

67. This is assuming that estimates of 1 to 1.5 million Americans harbor the virus. President Reagan and Vice President Bush recently called for wider mandatory testing. Bush Opens Meeting by Endorsing Wider Testing Proposed by Reagan, 2 AIDS Pol'y & L. (BNA), No. 10, at 1 (1987). Several states have considered legislation mandating testing in various situations. In 1986 testing bills were considered in California, Connecticut, Delaware, Florida, Hawaii, Indiana, Maine, Massachusetts, New Jersey, Oklahoma, Pennsylvania, and Washington. Intergovernmental Health Policy Project George Washington University, AIDS Related Bills Considered in the 1986 Legislative Sessions, 48-51 (1987).

68. Curran, supra, note 3, 226. It is much more difficult and less reliable to screen a person's blood for HIV directly. It is

not generally done. See, Classification Systems for Human Immunodeficiency Virus (HIV) Infection in Children Under 13 Years of Age, 36 Morbidity and Mortality Weekly Report 226 (1987) [hereinafter cited as Classification of Children]. Consequently, the lack of any documented cases of a person positive for antibodies being negative for the virus does not predict that it is impossible to eliminate the virus from the body.

69. Curran, supra, note 3, at 227-228.

70. Id.

71. Classification of Children, supra, note 68, at 229; Answers, supra, note 1, at 29.

72. Curran, supra, note 3, at 226.

73. Id.

74. Id., at 227.

75. Lord, Carey, Work & Goode, The Staggering Price of AIDS, 102 U.S. News & World Rep. 16-17 (June 15, 1987) [hereinafter cited as Lord].

76. Id.

77. Id.

78. Id.; AIDS' 1991 Economic Burden Projected to Be \$66 Billion, 2 AIDS Pol'y & L. (BNA) No. 8, at 3 (1987).

79. Intergovernmental Health Policy Project George Washington University, A Review of State and Local Government Initiatives Affecting AIDS, 33 (1987) [hereinafter cited as Initiatives].

80. Id.

81. Id., at 31.

82. Id., at 32.

83. Medicaid Seen Picking Up Large Share of Care Tab, 2 AIDS Pol'y & L. (BNA) No. 11, at 5-6 (1987).

84. Lord, supra, note 75, at 17.

85. Pentagon Says HIV Testing Shows 2,139 With Virus, 2 AIDS Pol'y & L. (BNA) No. 6, at 3 (1987). 1 to 1.5 million is .42 to .63% of the entire population. The military results yielded .17% positive of those on active duty tested and .15% positive among applicants to the service. Id.

86. Leonard, supra, note 7, at 35.

87. Review, supra, note 7, at 20. See, supra, note 25, for a list of suggested co-factors.

88. See, e.g., Leonard, supra, note 7, at 15.

89. Laws or regulations in several states have done this. See, Cal. Health & Safety Code §199.21(f) (West Supp. 1987); Prohibition of Discrimination in the Provision of Insurance Act of 1986, D.C. Act 6-170 (1986); Wis. Stat. Ann. §631.90 (West Supp. 1986). In New York the state Insurance Department prohibits HIV testing as a precondition to obtain health insurance but not life or disability insurance, New York to Ban HIV Tests for Health Insurance, 2 AIDS Pol'y & L. (BNA) No. 8, at 9 (1987). In Massachusetts the state Insurance Commission prohibits insurance companies from requiring HIV tests, Massachusetts Considers Sanctions Against Insurers, 2 AIDS Pol'y & L. (BNA) No. 1, at 3 (1987).

90. See, generally, Leonard, Employment Discrimination Against Persons With AIDS, 10 U. Dayton L. Rev. 689 (1985).

91. Id.

92. 42 U.S.C. §§1981 - 2000h (1982).

93. 42 U.S.C. §2000e-2 (1982).

94. 42 U.S.C. §2000e(b) (1982).

95. 29 U.S.C. §§621 - 634 (1982).

96. 29 U.S.C. §623(a) (1982).

97. 29 U.S.C. §623(g) (1982).

98. 29 U.S.C. §630(b) (1982).

99. If an individual can show that discrimination based on a medical or physical condition has a disparate impact on a protected class the employer will not be able to discriminate because of that condition unless there is a bona fide business necessity. Cf., Jefferies v. Chicago Transit Authority, 770 F.2d 676 (7th Cir. 1985) (discrimination because of sickle cell anemia); Equal Employment Opportunity Comm. v. Greyhound Lines, Inc., 635 F.2d 188 (3rd Cir. 1980) (discrimination because of pseudofolliculitis, a disease generally limited to black males); Smith v. Olin Chemical Corp., 535 F.2d 862 (5th Cir. 1976) (sickle cell anemia).

100. See, generally, Gittler, Fair Employment and the Handicapped: a Legal Perspective, 27 DePaul L. Rev. 954-6 (1978); Comment, AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act, 20 U. Rich. L. Rev. 433 (1986). Government workers have been able to assert due process and equal protection

objections to handicap discrimination when the reason for the discrimination does not have a rationale basis.

101. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§701-794).

102. See, e.g., Leonard, Employment Discrimination Against Persons with AIDS, 19 Clearinghouse Review 1296-8 (1986).

103. Smith-Fess Act, Pub. L. No. 66-236, 41 Stat. 735 (1920).

104. Discussion of these amendments is found in 1973 U.S. Code Cong. & Ad. News 2082-4.

105. 29 U.S.C. §791 (1982).

106. 29 U.S.C. §793 (1982). Section 502 (29 U.S.C. §792) deals with removal of architectural barriers.

107. 29 U.S.C. §794 (1982).

108. 29 U.S.C.A. §701 (West Supp. 1986) (Congressional declaration of purpose). Prior versions of this section state the Congressional purpose as the desire to "provide employment opportunities for the handicapped," Pub. L. No. 93-112, §2, 87 Stat. 357 (1973) and to guarantee equal opportunity for the handicapped, Pub. L. No. 95-602, 92 Stat. 2984 (1978).

109. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-4 (1984); de la Torres v. Bolger, 610 F.Supp. 593, 596 (N.D.Tex. 1985). The Act's protection is not limited to those who receive rehabilitation services.

110. Consolidated, 465 U.S. at 632-3, n. 13; Arline v. School Board of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985) aff'd, 107 S.Ct. 1123 (1987). Congress has noted that employment of the handicapped "is of critical importance [to] this Nation." White House Conference on Handicapped Individuals Act, 88 Stat. 1631 (1974). The benefit of integrating the handicapped into society is considered significant in view of increased productivity and decreased welfare support.

111. S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code & Cong. Ad. News 6373, 6389; School Board of Nassau County v. Arline, 107 S.Ct. 1123, 94 L.Ed.2d 307, 315 (1987); Arline, 772 F.2d at 764; Strathie v. Department of Transportation, 716 F.2d 227, 229, 231 (3rd Cir. 1983). Part of this concern is premised on the general moral sense that is associated with our Constitution, that all people are equal and should be given even handed treatment.

112. 29 U.S.C. §791 (1982).

113. Id.

114. See, e.g., Prewitt v. United States Postal Service, 662 F.2d 292, 301-3 (5th Cir. 1981).
115. See, e.g., Gardner v. Morris, 752 F.2d 1271, 1277 (8th Cir. 1985); Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985); McGuinness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984); Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983); Prewitt 662 F.2d at 302. In 1978, Pub. L. No. 95-602, 92 Stat. 2982, codified at 29 U.S.C. § 794a, afforded persons with a complaint under sections 501 and 504 of the Rehabilitation Act with the same remedies available under section 717 of the Civil Rights Act, 42 U.S.C. § 2000e-16 (1982).
116. 29 C.F.R. §§1613.701 - .709 (1986).
117. 29 U.S.C. § 793 (1982).
118. Id.
119. Drennon v. Philadelphia General Hospital, 428 F.Supp. 809, 814-6 (E.D.Pa. 1977).
120. See, e.g., Simon v. St. Louis County, 656 F.2d 316, 319 (8th Cir. 1981), cert denied, 455 U.S. 976 (1982); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir. 1980); Bento v. I.T.O. Corp. of Rhode Island, 599 F.Supp 731, 739 (D.R.I. 1984); see, generally, 60 A.L.R. Fed. 329 (1982).
121. 41 C.F.R. §60-741.20 - .32 (1986).
122. 41 C.F.R. Part 60-741 (1986).
123. 29 U.S.C. §794 (1982). The executive branch was included under this section in amendments made in 1978.
124. Id.
125. 31 U.S.C. §6716(b) (2) (1982).
126. 29 U.S.C. § 794 (1982).
127. 45 C.F.R. Part 84 (1986).
128. Exec. Order No. 12,250, 3 C.F.R. 298 (1980 Compilation) reprinted in 42 U.S.C.A. 2000d-1 note.
129. See, e.g., Doe v. New York University, 666 F.2d 761, 774 (2nd Cir. 1981); Simon 656 F.2d at 319; Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).
130. See e.g., Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984); Strathie, 716 F.2d at 230; Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1408 (5th Cir. 1983); Bentavegna v. United States Department of Labor, 694 F.2d 619 (9th Cir.

1982); Doe 666 F.2d at 774; Prewitt, 662 F.2d at 309-10; Bento, 599 F.Supp. at 774; Fitzgerald v. Green Valley Area Education Agency, 589 F.Supp. 1130, 1133 (S.D. Iowa 1984).

131. Under section 501, the final element is that the employer is the executive branch or the U.S. Postal Service.

132. When courts rule that a condition is a handicap it is usually in general terms and does not necessarily involve an in depth examination of the plaintiff's particular condition. See, School Board of Nassau County v. Arline, 94 L.Ed.2d 307, 316-20; Doe, 666 F.2d at 775-6; but, see, Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir 1986) (suggests a case by case determination of handicap status without resort to lists or categories of impairments).

133. See, e.g., Lawyers, Legislators See Justice Department Set-back, 2 AIDS Pol'y & L. (BNA) No. 4, at 4 (1987).

134. Thomas v. Atascadero Unified School District, F.Supp. (C.D. Cal. June 19, 1987) (available on WESTLAW, DCT Database); Local 1812, Am. Fed. of Gov't Employees v. United States Department of State, F.Supp., Case No. 87-0121 (D.D.C. April 22, 1987) (available on WESTLAW, DCT Database); accord, Doe v. Coughlin, 509 N.Y.S.2d 209, 211-2 (N.Y.App.Div. 1986); District 27 Community School v. Board of Education, 502 N.Y.S.2d 325 (N.Y.Sup.Ct. 1986).

135. 41 Daily Lab. Rep. (BNA) AA-3 (4 March 1987) (Statement of Professor A. Leonard).

136. Initially some courts construed "otherwise qualified" to mean qualified "but for" the handicap. Under this approach a blind man would be qualified to drive a school bus if he was capable of driving could he see. It is now settled that otherwise qualified means qualified "in spite of" the handicap. South-eastern Community College v. Davis, 442 U.S. 397, 406-7 (1979); 45 C.F.R. part 84, App. A at 327.

137. Southeastern, 442 U.S. 406-7; Gardner, 752 F.2d 1271, 1281 (8th Cir. 1985); Prewitt, 662 F.2d at 307; Carty v. Carlin, 623 F.Supp. 1181, 1186 (D.Md. 1985); Bey v. Bolger, 540 F.Supp. 910, 926 (E.D.Pa. 1982).

138. Alexander v. Choate, 469 U.S. 287, 300-302 (1985); Gardner, 752 F.2d at 1284.

139. Southeastern, 442 U.S. at 402-7; Strathie, 716 F.2d at 234; Treadwell, 707 F.2d at 475.

140. See, e.g., Gardner, 752 F.2d at 1280; Treadwell, 707 F.2d at 475; Doe, 666 F.2d at 775-6; Prewitt, 662 F.2d at 306-7.

141. See, e.g., Treadwell, 707 F.2d at 475.

142. Id. (the employer has the burden of showing that the plaintiff is unsafe or inefficient). Bey v. Bolger, 540 F.Supp. 910, 926 (E.D.Pa. 1982) (to be otherwise qualified an individual must be capable of safe and efficient performance of essential functions). Cf., Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971) (the defendant failed to show that discrimination based on IQ test was valid business necessity in light of disparate impact on minorities); Daubert v. United States Postal Serv., 733 F.2d 1367, 1370 (10th Cir. 1984) (union contract preventing accommodation was a valid business excuse for discrimination).

143. No federal court has considered this issue. The state courts and legislatures that have considered insurance and medical costs have rejected them as an economic hardship defense. Pa. Stat. Ann. tit. 43, §954(p) (Purdon Supp. 1987) ("Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job related."); State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106, 108 (N.Y. 1985) (if a person suffers an impairment, in this case obesity, employment may not be denied because of any actual or perceived undesirable effects on disability or life insurance programs); Dairy Equip. Co. v. DILHR, 95 Wis.2d 319, 290 N.W.2d 330, 332, 336-7 (Wis. 1980) (higher cost to the company for the care and treatment of handicapped respondent if injured does not permit discrimination); Chrysler Outboard Corp. v. DILHR, 14 Fair Empl. Prac. Cas. (BNA) 344, 345 (Wis. Cir. Ct. 1976) (higher cost of insuring cancer victim does not justify discrimination).

144. The Department of Justice, Office of General Counsel, recently opined that contagion is not a handicap and therefore if you discriminate against someone because they are contagious, you are not discriminating against them solely by reason of handicap even if they are handicapped. 122 Daily Lab. Rep. D-1 (June 25, 1986). This analysis was rejected by the Supreme Court in School Bd. of Nassau County, 94 L.Ed.2d 307 (1987), which held if a handicapped person is also contagious you cannot discriminate against them because of the contagion.

145. Private employers who do not receive federal aid or government contracts are not prohibited from discriminating against the handicapped under Federal law.

146. See, e.g., Colo. Rev. Stat. §24-34-402 (1982); Ga. Code Ann. §§34-6A-2, 4 (1984) (§34-6A-3 differs from the Federal statute by expressly excluding communicable disease from coverage under the act); La. Rev. Stat. Ann. §§46:2253 - 2254 (West 1982); Mass. Ann. Laws ch. 151B, §1, 4 (Michie/Law. Coop. Supp. 1987); Minn. Stat. Ann. §363.01 (West Supp. 1987).

147. Jasany v. United States Postal Serv., 755 F.2d 1244, 1248 (6th Cir. 1985).

148. 29 U.S.C.A. §706(8)(B) (West Supp. 1987).

149. School Bd. of Nassua County, 94 L.Ed.2d at 315-6.
150. See, e.g., Jasany, 755 F.2d at 1248-50
151. See, infra, notes 169-180. See, also, Carty v. Carlin, 623 F.Supp. 1181 (D.Md. 1985) (heart disease and a hernia considered a handicap). Cf., Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984) (Huntington's Chorea, a communicable disease, was considered a handicap without discussion).
152. 29 C.F.R. §1613.702 (1986).
153. 41 C.F.R. §60-741.2 (1986).
154. 45 C.F.R. §84.3 (1986).
155. The fact that the regulation includes cosmetic disfiguration as an impairment reflects a concern over a condition that does not directly impair an individual, but may cause discrimination because of peoples' perception. The question remains how far the courts will go in accepting the regulatory material supplementing the statute.
156. HIV can affect the neurological system. See, supra, note 20.
157. The primary opportunistic infection associated with AIDS is a pneumonia, an infection of the lungs.
158. HIV infects white blood cells, a component of the hemic and lymphatic systems.
159. 45 C.F.R. §84.3 (1986). The definition in 29 C.F.R. §1613.702 (1986) is the same except there is no mention of the respiratory system.
160. 41 C.F.R. §60-741.2 (1986). The regulations under sections 501 and 504 do not expressly define "substantially limits."
161. 41 C.F.R. §84.3 (1986); 29 C.F.R. §1613.702 (1986).
162. School Board of Nassau County, 94 L.Ed.2d at 316 (noting that the regulations were drafted with the oversight and approval of Congress); Mantolite, 767 F.2d at 1421-3; Jasany, 755 F.2d at 1250; Doe, 666 F.2d at 776-7; Prewitt, 662 F.2d at 307; Camenisch v. University of Texas, 616 F.2d 127, 132-3 (5th Cir. 1980); de la Torres, 610 F.Supp. at 596; Fitzgerald, 589 F.Supp. at 1136; Stevens v. Stubbs, 576 F.Supp. 1409, 1414 (N.D.Ga. 1983); Bey, 540 F.Supp. at 924; Doe v. Syracuse School Dist., 508 F.Supp. 333, 336-7 (N.D.N.Y. 1981); but, see, Bowen v. American. Hosp. Ass'n., 90 L.Ed.2d 584 (1986) (rejecting HHS regulations concerning profoundly handicapped infants). The HHS regulations can be more generous to the plaintiff than might be required by the statute. For example, 45 C.F.R. part 84, App. A at 331, states that the

reasonable accommodation requirement under §504 is the same as §503. This varies from some court decisions holding that §503 imposes a greater duty to accommodate than §504 because §503 has an affirmative action requirement. See, Southeastern Comm. College, 442 U.S. at 410-1; accord, Prewitt, 662 F.2d at 306; Fitzgerald, 589 F.Supp. at 1137. The regulations also provide that an employer may not ask an individual if he is handicapped. 45 C.F.R. §84.14 (1986). This prohibition has not been enforced by the courts. See, Southeastern Comm. College, 442 U.S. at 406; Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1410 (5th Cir. 1983).

163. A similar way to separate the various class of infected people has been suggested in Leonard, supra, note at 20.

164. See, e.g., Local 1812, ___ F.Supp. ___, (available on WESTLAW, DCT Database, at 7); In Brief, 1 AIDS Pol'y & L. (BNA) No. 23, at 7 (1986) (Maryland Comm. on Human Relations considers AIDS to be a handicap); Five States Call AIDS Handicap Under Anti-Bias Laws, 1 AIDS Pol'y & L. (BNA) No. 13, at 4 (1986) (the article actually lists 13 states: Colo., Del., Fla., Maine, Mass., Minn., N.H., N.M., N.Y., Or., R.I., Tex., & Wis.); Lawyers, Legislators See Justice Department Setback, 2 AIDS Pol'y & L. (BNA) No. 4, at 4 (1987).

165. School Bd. of Nassau County, 94 L.Ed.2d at 317 n. 7.

166. Thomas v. Atascadero Unified School Dist., ___ F.Supp. ___, (available on WESTLAW, DCT Database).

167. The plaintiff had ARC. The court notes the debilitating effects of AIDS then characterizes everyone infected with HIV as handicapped.

168. Local 1812 v. United States Dept. of State, ___ F.Supp. ___, (available on WESTLAW, DCT Database). Accord, Cronan v. N.E. Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1275-7 (Mass. Sup. Ct. 1986).

169. School Bd. of Nassau County v. Arline, 84 L.Ed.2d 307 (1987); Arline v. School Bd. of Nassau County, 772 F.2d 769 (11th Cir. 1985), aff'd 94 L.Ed.2d 307 (1987).

170. E.E. Black v. Marshall, 497 F.Supp 1088 (D. Hawaii 1980).

171. Davis v. Bucher, 451 F.Supp 791 (E.D.Pa 1978).

172. Doe v. New York Uni., 666 F.2d 761 (2nd Cir. 1981).

173. Vickers v. Veterans Admin., 549 F.Supp. 85 (W.D. Wash 1982).

174. Tudyman v. United Airlines, 608 F.Supp. 739 (C.D.Cal. 1984).

175. de la Torres v. Bolger, 610 F.Supp. 593 (N.D.Tex. 1985),
aff'd 781 F.2d 1134 (5th Cir. 1986).
176. Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir
1985).
177. Stevens v. Stubbs, 576 F.Supp. 1409 (N.D.Ga. 1983).
178. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1968).
179. Oesterling v. Walters, 760 F.2d 859 (8th Cir. 1985).
180. GASP v. Mecklenburg County, 42 N.C.App. 225, 256 S.E.2d 477
(N.C.Ct.App. 1979).
181. See, e.g., de la Torres, 610 F.Supp. at 596.
182. See, e.g., Doe, 666 F.2d at 775; Carty, 623 F.Supp. at 1185;
E.E. Black, 497 F.Supp. at 1096-8.
183. See, e.g., Jasany, 755 F.2d at 1250-1.
184. 497 F.Supp. 1088 (D.Hawaii 1980).
185. Id., at 1091.
186. Id., at 1098-1100.
187. Id., at 1100.
188. Id., at 1099. "A person who is disqualified from employment
in his chosen field has a substantial handicap to employment, and
is substantially limited in one of his major life activities."
189. See, de la Torres, 610 F.Supp. at 596; accord, Advocates
For Handicapped v. Sears, Roebuck & Co., 67 Ill.App.3d 512, 385
N.E.2d 39, 43 (Ill.App.Ct. 1978)(kidney transplant recipient). A
universal discrimination law is not necessarily bad, but it does
exceed the scope of the Rehabilitation Act. There is an obvious
temptation to expand the coverage of the Act by any jurist inter-
ested in evenhanded treatment of everyone in the employment
market. This temptation is fueled further by Congressional
statements that the Act was intended to prevent unreasonable
prejudice and attitudes hindering employment opportunities.
190. Jasany, 755 F.2d at 1248-9; Tudyman, 608 F.Supp. at 746.
191. Am. Nat. Ins. Co. v. Fair Empl. & Housing Comm., 32 Cal.3d
603, 651 P.2d 1151, 186 Cal.Rptr. 345 (Cal. 1982)(high blood
pressure); Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520,
259 S.E.2d 248 (N.C. 1979)(glaucoma); Philadelphia Elec. Co. v.

Pennsylvania Human Relations Comm., 448 A.2d 701 (Pa.Comm.w.Ct. 1982) (obesity).

192. 259 S.E.2d at 253.

193. 651 P.2d at 1155.

194. Local 1812, __F.Supp.__ (available on WESTLAW DCT Database, at 7).

195. These arguments are discussed infra, 29-30.

196. Pub. L. No. 95-602, 92 Stat. 2982 (1978); Pub. L. No. 93-516, 88 Stat. 1619 (1974).

197. Jones, N.L., Legal Analysis of Department of Justice, Office of Legal Counsel, Memorandum on the Application of Section 504 of the Rehabilitation Act of 1973 to Persons with AIDS, Congressional Research Service, Library of Congress, 21 (August 25, 1986); Leonard, supra, note 7, at 27; cf., Local 1812, __F.Supp.__, (available on WESTLAW DCT Database, at 7).

198. School Bd. of Nassau County, 94 L.Ed.2d at 317 n. 7.

199. An attempt to amend the Rehabilitation Act following School Bd. of Nassau County to expressly exclude coverage of contagious diseases failed in committee. 97 Daily Lab. Rep. (BNA) A-11 (1987).

200. See, supra, note 110.

201. It must relate to the potential impairment or else the discrimination is not solely because of the handicap.

202. School Bd. of Nassau County, 94 L.Ed.2d at 317.

203. See, e.g., de la Torres, 610 F.Supp. at 596 (left-handedness); Tudyman, 608 F.Supp. at 745 (over weight); accord, Providence Journal Co. v. Mason, 359 A.2d 682 (R.I.Sup.Ct. 1976) (whiplash considered too minor to be an impairment).

204. 29 U.S.C.A. § 706(8)(B) (West Supp. 1987).

205. See, e.g., Jasany, 755 F.2d at 1249.

206. Bento, 599 F.Supp. at 736 (plaintiff, a longshoreman, was given work by all other employers of longshoreman in area except defendant); E.E. Black, 497 F.Supp. at 1094, 1099.

207. Jasany, 755 F.2d at 1249; E.E. Black, 497 F.Supp. at 1100-1.

208. Tudyman, 606 F.Supp. at 745-746.

209. Southeastern Comm. College, 442 U.S. at 405.

210. Gardner, 752 F.2d at 1281; Prewitt, 662 F.2d at 307; Carty, 623 F.Supp. at 1186; Bey, 540 F.Supp. at 926.

211. See, e.g., Mantolete, 767 F.2d at 1423-4 (the defendant has the burden to develop possible accommodation plans and prove that accommodation is not possible even if the plaintiff can offer no suggested accommodations); Gardner, 752 F.2d at 1280 (the plaintiff must produce sufficient evidence to make a facial showing that reasonable accommodation is possible, then the defendant bears the burden of proving the inability to accommodate the handicap); Treadwell, 707 F.2d at 475 (the defendant must show that the job criteria disqualifying the plaintiff is job related); Doe, 666 F.2d 776-7 (the plaintiff must prove that "but for" the handicap he is qualified, the defendant must then prove that the plaintiff is not qualified "in spite of" the handicap); accord, New York State Ass. for Retarded Children v. Carey, 612 F.2d 644, 650 (2nd Cir. 1979) (the defendant could not meet his burden of showing hepatitis B posed a risk in the classroom because there was no epidemiologic evidence documenting transmission through casual contact).

212. Southeastern Comm. College, 442 U.S. 405-8.

213. Treadwell, 707 F.2d at 475; Doe, 66 F.2d at 776-7.

214. Doe v. Region 13, 704 F.2d 1409; Bento, 599 F.Supp. at 742.

215. Treadwell, 707 F.2d at 475; Doe, 66 F.2d at 776-7.

216. 94 L.Ed.2d 307 (1987).

217. Id., at 320 n. 16; Mantolete, 767 F.2d at 1421-2 (rejecting elevated risk test for proof of substantial harm); Doe, 666 F.2d at 777 (rejecting "more likely than not" test for substantial harm).

218. School Bd. of Nassau County, 94 L.Ed.2d at 321; accord, New York State Ass. for the Retarded, 612 F.2d at 650.

219. School Bd. of Nassau County, 94 L.Ed.2d at 321.

220. The restrictions on nuclear power plants and recombinant DNA are examples where courts and legislatures have allowed the potential for major harm to overshadow the low probability that the harm will ever occur. See, Slovic, supra, note 60, at 485-8. Fear of genital herpes, an incurable, but not fatal, disease, also has led to several cases of inappropriate risk assessment. See, Comment, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale L. & Pol'y Rev. 479, 496-504 (1985).

221. Board. of Educ v. Cooperman, 209 N.J.Super. 174 , 507 A.2d 253, 267-71 (N.J.Super.Ct.App.Div. 1986) (noting some risk of transmission of HIV in the classroom); 108 Daily Lab. Rep. (BNA) A-1 (June 8, 1987) (reporting arbitration hearing holding that

employee with AIDS would pose a danger working in a nursing home); cf., Cordero v. Coughlin, 607 F.Supp. 9 (S.D.N.Y. 1984)- (noting risk of transmission of HIV in prison setting); Georgia School Board Bans Students, Teachers With AIDS, 1 AIDS Pol'y & L. (BNA) No. 16, at 3 (1986).

222. Passenger Sues American Airlines Over Bite, 1 AIDS Pol'y & L. (BNA) No. 17, at 2 (ticket agent with HIV infection bit passenger during altercation. The suit seeks \$25,000 in damages for assault and battery, \$1 million for emotional suffering, \$1 million for negligent hiring, and \$10 million for exemplary damages).

223. 159 F.2d 169 (2nd Cir. 1947).

224. Answers, supra, note 1, at 5-7.

225. 94 L.Ed.2d 307.

226. Answers, supra, note 1, at 5-7. An AIDS victim with tuberculosis is capable of transmitting it to otherwise healthy people.

227. See, e.g., Duran v. City of Tampa, 430 F.Supp. 75, 78 (M.D.Fla. 1977).

228. E.E. Black, 497 F.Supp. at 1104

229. 94 L.Ed.2d 307.

230. See, supra, note 25.

231. See, e.g., Bentivegna, 694 F.2d at 662-3.

232. See, e.g., Gardner, 752 F.2d at 1284; Grube v. Bethlehem Area School Dist., 550 F.Supp. 418, 423 (E.D.Pa. 1982); Wright v. Columbia Uni., 520 F.Supp. 789 (E.D.Pa. 1981); Poole v. South Plainfield Bd. of Educ., 490 F.Supp. 948, 953-4 (D.N.J. 1980).

233. Local 1812, F.Supp. (available on WESTLAW, DCT Database, at 8-11); see, also, Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985)(manic-depressive employee properly denied post in Saudi Arabia where his medical condition could not be monitored or treated).

234. See, supra, note 8.

235. Macher, AIDS Case For Diagnosis, 151 Military Med. 62-63 (1986) (Coccidioides immitis).

236. Redfield, Wright & Tramont, The Walter Reed Staging Classification for HTLV-III/LAV Infection, 314 N. Eng. J. Med. 131 (1986)[hereinafter cited as Redfield].

237. Id.; cf., Local 1812, F.Supp. (available on WESTLAW, DCT Database, at 5).

238. Local 1812, __F.Supp.__ (available on WESTLAW, DCT Database, at 5); Redfield, supra, note 236, at 131.
239. See, supra, note 38.
240. 29 U.S.C. §§1001 - 1461 (1982).
241. 29 U.S.C. §1140 (1982); see, generally, Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983); Folz v. Marriott Corp., 594 F.Supp 1007 (W.D.Mo. 1984); Martucci, Utz, Unlawful Interference with Protected Rights Under ERISA, 42 J. Mo. B. 177 (1986).
242. 29 U.S.C. §623(g) (1982)
243. 42 U.S.C. §2000e(k) (1982); see, generally, 15 Am.Jur.2d Civil Rights §177 (1976 & Supp. 1986).
244. See, supra, note 143; but, see, Metropolitan Dade County, 274 So.2d at 585.
245. Metropolitan Dade County, 274 So.2d at 585; Advocates for the Handicapped, 385 N.E.2d at 41; Philadelphia Elec. Co., 448 A.2d at 707-8.
246. Southeastern Comm. College, 442 U.S. at 510; Gardner, 752 F.2d 1284; Treadwell, 707 F.2d at 478; Bey, 540 F.Supp. at 926.
247. 45 C.F.R. §84.12 (1986).
248. See, supra, note 89.
249. See, e.g., Bentivegna, 694 F.2d at 623; but, see, Philadelphia Elec. Co., 448 A.2d at 708 (allowing a presumption).
250. See, e.g., Pushkin, 658 F.2d at 1389; Stevens 576 F.Supp. at 1413-4.
251. Cf., Bentivegna, 694 F.2d at 621-2.
252. Cronan v. N.E. Tel. & Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1268, 1260 (D.Mass. 1986)(employees threatened to lynch plaintiff with AIDS if he returned to work); Sanitation Workers Refuse to Work With Colleague, 1 AIDS Pol'y & L. (BNA) No. 12, at 7 (1986)(40 N.Y. sanitation workers refused to work out of same garage as AIDS victim).
253. Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315 (5th Cir. 1986)(worker doused with carcinogenic substance sued because of fear of developing cancer); Nurse Charge AIDS Stress Caused Son's Birth Defects, 2 AIDS Pol'y & L. (BNA) No. 7, at 6 (1987); Nurse Wins Comp Claim Over Fear of AIDS, 2 AIDS Pol'y & L. (BNA) No. 3, at 2 (1987).

254. See, 29 C.F.R. § 1604.2(a)(1)(iii) (1986); accord, 669 F.2d 1179, 1181 (7th Cir. 1982) (preference of race); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (preference of sex); Sprogis v. United Airlines, 444 F.2d 1194, 1199 (7th Cir. 1971) - (preference of sex); Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); but, see, Firing of Gay Employee Over AIDS Fear Upheld, 2 AIDS Pol'y & L. (BNA) No. 7, at 8 (1987) (industrial tribunal upheld firing of homosexual in U.K. because of co-employees' fear of contracting AIDS).

255. 29 U.S.C. §157 (1982); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (upholding employees rights under the Act to engage in concerted activity in response to perceived threat to health and safety); see, generally, Atleson, Threats to Health and Safety: Employee Self-Help Under the NLRA, 59 Minn. L. Rev. 647 (1975); Allen & Linenberger, The Employee's Right to Refuse Hazardous Work, 9 Empl. Rel. L. J. 251 (1983).

256. 29 U.S.C. §143 (1982). Actions under this section will be tested under an objective good faith test. The employee must have ascertainable objective evidence of the danger. Gateway Coal v. United Mine Workers, 414 U.S. 368 (1974); see, also, Redwing Carriers, 130 N.L.R.B. 1208, 1209 (1961).

257. 29 U.S.C. §654 (1982). The Act itself does not permit refusal to work because of a perceived threat to safety. Regulation promulgated by the Secretary of Labor permit refusal when there is no reasonable alternative and when acting on good faith with reasonable apprehension. The right conferred by these regulations was upheld in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

258. Action taken under section 7 of the National Labor Relation Act can be justified by an honest belief that the work is dangerous. See, Washington Aluminum, 370 U.S. at 13-15; NLRB v. Modern Carpet Ind., Inc., 611 F.2d 811, 814-15 (10th Cir. 1979). It does not matter if the belief is unreasonable or unjustified. See, Union Boiler Co., 213 N.L.R.B. 818 (1974). Section 7 is limited to concerted activity not otherwise barred by a union contract.

259. The subjective good faith standard applies only to section 7 of the NLRA.

260. W.R. Grace & Co. v. Local Union 759, United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983) (The employer signed a conciliation agreement with EEOC to avoid suit for discrimination against women. This agreement violated seniority provisions of an existing collective bargaining agreement. The Supreme Court held against the company for violating the bargaining agreement even though the company was trying to redress sex discrimination.)

261. See, supra, note 255.

262. Diaz, 442 F.2d at 389.

263. See, supra, note 89.

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